U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 29 September 2004

BALCA Case Nos.: 2003-INA-294
2003-INA-295
ETA Case Nos.: P2001-NJ-02473730
P2001-NJ-02473731

In the Matter of:

MANUEL DA CUNHA CONSTRUCTION,
Employer,

on behalf of

HUMBERTO ORTIZ PARDO,

and

FRANCO JUMBO,
Aliens.

Certifying Officer: Delores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from two applications for labor certification[1] filed by Manuel Da Cunha Construction ("the Employer") on behalf of Humberto Ortiz Pardo and Franco Jumbo ("the Alien") for the position of Bricklayer. (AF 13-16). The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c). Because the same or

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11. [2]

STATEMENT OF THE CASE

On August 4, 1999, the Employer filed an application for alien employment certification on behalf of the Alien for the position of Bricklayer. (AF 13-16).

On February 18, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis that the documentation submitted by the Employer failed to adequately document permanent full-time employment, as required by 20 C.F.R. § 656.3. (AF 52-55). The CO noted that the October 2002 Newark, New Jersey phone book did not contain a listing for the Employer. The New Jersey Unemployment Insurance ("UI") computer system does not contain the Employer's new Federal Employer Identification Number ("FEIN"), which was assigned by the IRS on August 16, 2000, but sent to an address different than the one listed on the ETA 750. The Employer's previous FEIN has been inactive since 1994. According to Department of Labor records, the Employer's submitted phone number and address had been used on other alien labor certification applications submitted by Gaivota Restaurant. The Employer was requested to document how he could guarantee permanent, full-time employment by providing a list of his current workers, whether they are full- or part-time, employee or nonemployee, his tax returns, and an explanation of his relationship with the Gaivota Restaurant. If any workers were employees, the Employer was directed to explain why there is no listing for his company in the New Jersey UI computer system.

On April 11, 2003, after being granted an extension of time by the CO, the Employer filed a rebuttal to the NOF. (AF 56-111). The Employer's rebuttal explained that the phone number listed on the ETA 750 was his home number and that his former

[2] In this decision, "the Alien" refers specifically to Humberto Ortiz Pardo and references to the Appeal File ("AF") refer to BALCA 2003-INA-294 as representative of the Appeal File in both cases. A virtually identical application was filed for both Aliens and the issues raised and dealt with by the CO in both cases are identical.

tenant, who owned the Gaivota Restaurant, also used the same number. The Employer stated that there were no UI records containing his new FEIN because his workers do not have social security numbers, and therefore, the Employer is unable to withhold deductions. The Employer reports and pays current workers' taxes via IRS 1099-MISC forms. The Employer's rebuttal included his tax returns for 2000, 2001, and 2002, a list of workers for each of those years, and a 1099-MISC for each worker. The Employer's rebuttal further asserted an ongoing need to continue hiring new workers, as aliens often leave for better jobs as soon as they are certified.

On June 11, 2003, the CO issued a Final Determination ("FD") denying certification. (AF 112-115). The CO found that the Employer's workers do not have social security numbers and the 1099-MISC forms submitted for them indicate that they are not employees, as their pay was indicated in the "other income" box. The Employer has failed to document that an employer-employee relationship exists. The Employer failed to rebut the CO's finding that his new FEIN is not listed in the New Jersey UI computer system, and his old FEIN has been "dead" since 1994, indicating that the Employer has not had any employees since 1994. Furthermore, the Employer has not documented that this practice will change.

On July 7, 2003, the Employer filed a Request for Review and the matter was docketed in this Office on September 30, 2003. (AF 1-6). The Employer admitted using the "other income" box on the 1099-MISC to indicate income paid to his workers, but argued that he did not use the "nonemployee compensation" box, as these workers are his employees. The Employer stated that this does not negate the employer-employee relationship. The Employer further argued that while his new FEIN is not active in the UI computer system, the new FEIN is used in other aspects of his business, including paying taxes. The Employer also submitted two affidavits, one from each Alien.

DISCUSSION

According to 20 C.F.R. § 656.3 "[e]mployment means permanent full-time work by an employee for an employer other than oneself." The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988).

The employer must provide information about the employer-employee relationship if it is requested by the CO. *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*). Failure to address a deficiency noted in the NOF is cause for a denial of labor certification. "[R]ebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*).

The Employer has not met his burden. The CO properly gave little weight to the Employer's self-serving assertion that the Aliens are employees. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The Employer has not only failed to rebut the CO's finding that the Employer's new FEIN is not listed in the New Jersey UI computer system, but admitted it by failing to rebut with sufficient documentation. The Employer further failed to show that his old FEIN had been used at any time since 1994. In addition, the Employer reports its workers' income via 1099s, which are used for work performed by contractors or nonemployees, as opposed to employees whose income

would be reported on a W-2. Indeed, the 1099s clearly show that the Employer did not withhold Federal taxes from the Aliens' paychecks.

In *Koam Poultry Technical Service*, 1990-INA-596 (July 17, 1992), the petitioner failed to document that it was an "employer" within the meaning of the Act as it did not document that it withheld taxes, social security, or other unemployment insurance for its workers. The employer asserted that it supervised and controlled the workers and provided the tools and equipment for the job but these assertions, as in the instant case, were not "supported by documentary evidence or statements by a person with knowledge of the facts." *Id.*

In this case, the employer-employee relationship is tenuous at best. For example, there is no indication that the Alien is not a contractor. Here, as in *Sheldon Smith Aviation*, 1991-INA-90 (June 1, 1993), the Employer did not withhold social security or taxes from the Aliens' income. Based on the foregoing, we find that the Employer has not carried its burden of proof to document that a permanent, full time position exists. As such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.